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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 33 3

MURRAY WINTERS,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

ARTHUR N. SEIFF,
Counsel for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 636

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee,
against
MURRAY WINTERS,
Defendant-Appellant

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, the above appellant files this separate statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of conviction appealed from herein, as follows:

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code as amended by the Act of January 1, 1938 (28 U. S. C. A., Sections 861 (a) and 861 (b)), since this is a cause wherein a final judgment has been rendered or passed upon by the highest court of a State in which a decision could be had where is drawn in question the validity of a State statute on the ground that it is repugnant to the Constitution of the United States.

The date of the judgment of the Court of Appeals of the State of New York is July 19, 1945, and of the Court

of Special Sessions, July 27, 1945. The date upon which application for appeal is presented is August 2, 1945.

The State law whose validity is involved is Section 1141, sub. 2 of the Penal Law of the State of New York which reads as follows:

> "A person * * * who * * *
> 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *
>
> * * * * * * *
>
> Is guilty of a misdemeanor * * *."

The action is a prosecution by the appellee of the appellant charging him with a violation of Section 1141, sub. 2 of the Penal Law in that he possessed with intent to sell copies of a magazine called "Headquarters Detective, True Cases from the Police Blotter." He was found guilty of that offense and fined the sum of One Hundred ($100) Dollars. At the trial the constitutional validity of the statute was challenged (fol. 95-102, p. 32-34) upon a motion to dismiss the information. The court overruled the challenge and found defendant-appellant guilty. The following appeared at the trial:

> "Mr. Rosenthal: Would your Honor hear me at greater length on the question of subdivision 2?
> "Justice Cooper: All right.
> "Mr. Rosenthal: I made a research into the cases decided under this section and could find no cases, or no cited cases under subdivision 2. In my humble opinion, that subdivision is clearly unconstitutional,

and I say it for this reason: that if you follow the letter of the law, a case-book used in law school in criminal law, which is a book composed primarily of crime or stories of crime or articles concerning crime, would be banned by this subdivision.

"Justice Doyle: You claim that our New York criminal law library then would——

"Mr. Rosenthal: If you follow the letter of the law, I say to you that every detective thriller, every detective story that has been written, these crime and mystery stories that are published and sold throughout the land, can be banned by this section, if you follow that section; and that the various Western stories, biff-bang boys, Dead-eye Dick shoots four Indians, all the Nick Carter stories which I read as a boy, and I imagine some of the members on this bench read; even Horatio Alger with some of his blood and thunder.

"Justice Cooper: As far as I am concerned, you are treading on safer ground when you speak of Horatio Alger. I'll tell you how much I think of Horatio Alger. I really feel that while it is not literature, it has done a great deal to inculcate in boys as they grow up some of the very fine copy-book maxims. But I certainly think that is a far cry from the lurid, crazy material that makes up People's Exhibits 4 and 5.

"Justice Doyle: We know so many Horatios on our bench, too, you know.

"Mr. Rosenthal: That I know.

"Might I say this with respect to People's Exhibits 4 and 5: I happen to know—not with respect to this particular magazine, but in general—how these magazines are created. They are written primarily and practically entirely by either newspaper men or retired newspaper men. The facts are obtained from files of the various police courts or the various newspaper clips, and it is a rehashing and a rewriting of things that have been in public print.

"Now, I can't see where a limitation of the sort that is attempted to be set forth in subdivision 2 is constitutional, because if you follow it to its logical

conclusion, every book, every magazine that deals with bloodshed or lust or things of that sort, and deals with nothing else—I mean, the average detective story, it deals with a crime, sometimes there is a killing in it, sometimes there are three or four or five killings in it; The Bat, the play The Bat——

"Justice Cooper: It is not the killings per se, Mr. Rosenthal; it is the manner in which it is treated and handled and set up in the magazine—the typography, and the language used to depict these crimes—that we feel brings it within the prohibition of subdivision 2 of the section involved; and that, of course, is our judgment; we may be in error.

"Mr. Rosenthal: I understand.

"Justice Cooper: But we know the arguments that are always advanced, and we have examined these exhibits particularly to decide whether from our point of view they do offend within the meaning of that subdivision, and we have decided that they do as a prima-facie case.

"Mr. Rosenthal: I understand.

"May I have an exception to your Honors' ruling on the motion.

"Justice Cooper: Certainly, certainly."

The Appellate Division thereafter, upon appeal to it, affirmed the judgment with an opinion hereto annexed upholding the constitutional validity of the law. An appeal was thereupon duly heard and decided by the Court of Appeals on the sole claim that the law was repugnant to the Constitution. That Court by a divided vote upheld its validity, and wrote an opinion, a copy of which is hereto annexed.

The question is a substantial one not only because the validity of this statute was never passed upon before in the Courts of the State of New York, or in the Supreme Court of the United States, but also the opinions rendered in the courts in which this case was heard indicate that a

review is necessary to set at rest serious questions concerning freedom of publication. The statute attacked purports on its face and by its application to suppress the freedom of publication, and that it is so indefinite that one publishes or distributes a book or magazine at his peril. Intensive research reveals that the Supreme Court of the United States has never passed upon a similar statute, and therefore its novelty and public importance renders the question a substantial one.

Respectfully submitted,

ARTHUR N. SEIFF,
Attorney for Defendant-Appellant.

APPENDIX "A"

Opinion of Appellate Division, First Department

SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT, MARCH, 1944

Francis Martin, P. J.; Alfred H. Townley, Edward J. Glennon, Edward S. Dore, Albert Cohen, J. J.

14150

PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

vs.

MURRAY WINTERS, *Appellant*

Appeal from a judgment of the Court of Special Sessions of the City of New York, County of New York, convicting defendant of the crime of possessing with intent to sell magazines in violation of Subdivision 2 of Section 1141 of the Penal Law.

Arthur N. Seiff for appellant.

Alan J. Elliot of counsel (Stanley H. Fuld with him on the brief; Frank S. Hogan, District Attorney) for respondent.

Emanuel Redfield of counsel (Osmond K. Fraenkel, attorney) for New York City Committee, American Civil Liberties Union as *Amicus Curiae*.

Opinion of Appellate Division, First Department

COHEN, *J.*:

Defendant, a book dealer, found in possession of a large number of magazines which purported to contain true cases of crimes from police records and files, was convicted in the Court of Special Sessions of the City of New York of a violation of Subdivision 2 of Section 1141 of the Penal Law.

The statute reads as follows:

"A person * * * who * * *

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; * * *

* * * * * * *

Is guilty of a misdemeanor * * *."

Upon the evidence submitted at the trial, there was a sufficient showing that defendant had in his possession the magazines with intent to sell. As the information charges, the magazines are, without doubt, "devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." They contain a collection of crime stories which portray in vivid fashion tales of vice, murder and intrigue. The stories are embellished with pictures of fiendish and gruesome crimes, and are besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as "Bargains in Bodies," "Girl Slave to a Love Cult," and "Girls' Reformatory"; these suggest the pattern of the literature.

That such publications tend to demoralize the minds of their more impressionable readers cannot be doubted. The statute which is aimed at restraining the publication and sale of such printed matter, we think, is a legitimate exercise of the police power of the state in that it is designed to promote the general welfare and to protect the morals of the community (*People* v. *Gitlow*, 234 N. Y. 132, 137, affirmed *Gitlow* v. *New York*, 268 U. S. 652). A similar statute was upheld by the Supreme Court of Errors of the State of Connecticut upon the ground that publications devoted wholly or mainly to lawless deeds of bloodshed,

lustful or lascivious conduct are "calculated to induce, especially among the young, the immoralities they are thus incited to dwell upon, and so to endanger the public morals" (*State* v. *McKee*, 73 Conn. 18, 26, 46 Atl. 409, 412).

Upon the same principle, it has been held in other jurisdictions, that a state may forbid the publication of details of an execution of death for crime (*State* v. *Pioneer Press Co.*, 100 Minn. 173, 110 N. W. 867) or the publication of scandal, and stories of immoral conduct (*Williams* v. *State*, 130 Miss. 827, 94 So. 882; *In re Banks*, 56 Kan. 242, 42 Pac. 693, 694; *State* v. *Van Wye*, 136 Mo. 227, 37 S. W. 938; *Commonwealth* v. *Herald Pub. Co.*, 128 Ky. 424, 108 S. W. 892).

The statute here involved condemns the sale and printing of books, pamphlets, magazines and newspapers, which are "devoted to the publication and principally made up of" pictures and stories of deeds of bloodshed, lust or crime. Publications dealing with crime news as an incident to the legitimate purposes of science or literature are not prohibited. Moreover, as the prosecution readily concedes, the statute does not seek to suppress "a large class of recognized literature including practically all detectives and western stories and books. It is aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a manner that would have a tendency to demoralize its readers and would be likely to corrupt the morals of the young and lead them to immoral acts.

Defendant urges that the law under which he was convicted is unconstitutional in that it violates the State Bill of Rights (Art. 1, Section 8) and the Fourteenth Amendment of the Federal Constitution.

The State Constitution (Art. 1, Section 8) provides in part:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

The freedom of speech and of the press, which is secured by such a constitutional guaranty, does not imply complete

exemption from responsibility for everything a citizen may say or publish. Indeed, the state Bill of Rights expressly provides that a person exercising the freedom is responsible for the abuse of that right.

Pursuant to the police power and without abridging freedom of the press, the state may enact reasonable regulations in order to protect the general welfare, public safety and order and public morals. In *People* v. *Gitlow, supra,* the Court of Appeals (at p. 137) said:

> "While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the Legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the Legislature may control and the courts may punish the licentiousness of the press."

In *People* v. *Most,* 171 N. Y. 423, the court said (p. 431):

> "The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. It does not shield a printed attack on private character, for the same section from which the above quotation is taken expressly sanctions criminal prosecution for libel. It does not permit the advertisement of lotteries, for the next section prohibits lotteries and the sale of lottery tickets. It does not permit the publication of blasphemous or obscene articles, as the authorities uniformly hold. (People v. Ruggles, 8 Johns. 290, 297; People v. Muller, 96 N. Y. 408; In Re Rapier, 143 U. S. 110). It places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation. * * *"

By the due process clause of the Fourteenth Amendment of the Federal Constitution, it is provided:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law."

It is now well settled that freedom of the press, like freedom of speech, is a fundamental public right and that the due process clause of the Fourteenth Amendment may make it unlawful for a State to abridge by its statutes freedom of the press which the First Amendment safeguards against encroachment by Congress. (*Thornhill* v. *Alabama*, 310 U. S. 88, 95; *Lovell* v. *Griffin*, 303 U. S. 444, 450; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244; *Palko* v. *Connecticut*, 302 U. S. 319, 324.) However, it is equally well settled that this constitutional guaranty of freedom of speech and of the press does not deprive the State of its police power to enact laws in the legitimate exercise of the police power. (*Gitlow* v. *New York*, 268 U. S. 652, 666, 667; *Stromberg* v. *California*, 283 U. S. 357, 359, 368, 369.) In *Near* v. *Minnesota*, 283 U. S. 697, the Supreme Court reiterated the principle in the following language by Chief Justice Hughes (p. 707):

> "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. * * * In maintaining this guaranty, the authority of the state to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. * * * Liberty of speech, and of the press, is also not an absolute right, and the state may punish its abuse."

Accordingly, we conclude that the statute challenged is valid, that its enactment is a legitimate exercise of the

police power of the State, and that it is not violative of the State or the Federal Constitution.

The judgment of conviction should be affirmed.

All concur.

APPENDIX "B"

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent, et al.*,

v.

MURRAY WINTERS, *Appellant*

(Decided July 19, 1945)

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the first judicial department, from a judgment of said court, entered May 19, 1944, which unanimously affirmed a judgment of the Court of Special Sessions of the City of New York, New York County (Cooper, P. J.; Flood and Doyle, JJ.), convicting defendant of the crime of unlawfully possessing, with intent to sell, printed paper devoted to accounts of deeds of bloodshed, lust or crime, in violation of subdivision 2 of section 1141 of the Penal Law.

Arthur N. Seiff for appellant.

Emanuel Redfield and Osmond K. Fraenkel for New York City Committee of American Civil Liberties Union, *amicus curiae*, in support of appellant's position.

Sidney R. Fleisher for Authors' League of America, Inc., *amicus curiae*, in support of appellant's position.

Frank S. Hogan, District Attorney (Alan J. Elliot and Whitman Knapp of counsel), for respondent.

LOUGHRAN, *J.*:

After trial in the Court of Special Sessions of the City of New York, the defendant was convicted upon charges that he had possessed certain printed materials with intent to sell them, contrary to Penal Law, article 106, section 1141, subdivision 2. The Appellate Division affirmed

and the justice who wrote its opinion gave the defendant leave to present the case to us.

The relevant words of section 1141 are these: "A person * * * who * * * 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime * * * is guilty of a misdemeanor * * *." Numerous copies of magazines composed entirely of such pictures and stories were found on the occasion in question in the bookshop of the defendant.

Defense counsel takes the above text at its full literal meaning. "The statute (he says) makes no distinction between truth, fiction and statistics. All come within its condemnation equally, provided they consist of 'criminal news' or 'police reports' or 'accounts of criminal deeds.'" From his viewpoint the statute "condemns any publication devoted to and principally made up of criminal news or police reports or accounts of criminal deeds regardless of the manner of treatment." This conception—which would outlaw all commentaries on crime from detective tales to scientific treatises—may, we think, be dismissed at once on the short ground that its manifest injustice and absurdity were never intended by the Legislature. (See *Crooks* v. *Harrelson*, 282 U. S. 55.) On the other hand, we are to heed the rule which tells us to read a statutory text in accordance with the general subject matter of which it is a part. (See *Matter of Rouss*, 221 N. Y. 81, 91; *Matter of Kaplan* v. *Peyser*, 273 N. Y. 147.)

In this instance, the general subject matter constitutes Penal Law, article 106, the caption of which is "Indecency." The above text forms subdivision 2 of section 1141 of article 106. The caption of section 1141 is "Obscene prints and articles." Indecency and obscenity are not and never have been technical terms of the law and hence we are without any full or rigorous definition of the uses made thereof in the administration of justice. To be sure, our

statutes dealing with indecent or obscene publications have generally been held to speak of that form of immorality which has relation to sexual impurity. (*People* v. *Muller*, 96 N. Y. 408; *Swearington* v. *United States*, 161 U. S. 446.) Such indeed is the way this court has read subdivision 1 of section 1141 of the Penal Law. (*People* v. *Eastman*, 188 N. Y. 478.) But to limit the above words of subdivision 2 of section 1141 to that restricted meaning would be to reduce that subdivision to an unnecessary partial reduplication of subdivision 1. Since our respect for the Legislature is enough to keep us away from that interpretation, we move along to the question of the validity of the broader scope of subdivision 2. From this point on, that subdivision will be called the statute.

Indecency or obscenity is an offense against the public order. (9 Halsbury's Laws of England (1st ed.), 530, 538; Harris & Wilshire's Criminal Law (17th ed.) 216; 1 Bishop's Criminal Law (9th ed.) 500, 504.) Collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, though not necessarily in the sense of being calculated or intended to excite sexual passion. This idea, as it seems to us, was the principal reason for the enactment of the statute. (Cf. *Magon* v. *United States*, 248 F. 201, certiorari denied, 249 U. S. 618; *Foy Productions, Ltd.* v. *Graves*, 278 N. Y. 498.)

There is, as we are also persuaded, ample warrant in the evidence for the finding that the magazines which were taken from the defendant's premises were obnoxious to the statute. The 2,000 copies he kept there were tied up in small bundles that were suitable for delivery to distributors. There is proof of an admission by the defendant of his readiness to sell single copies indiscriminately. The contents are nothing but stories and pictures of criminal deeds of bloodshed and lust. The Appellate Division said: "The stories are embellished with pictures of fiendish and gruesome crimes, and besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as 'Bargains in Bodies,' 'Girl Slave to a Love Cult'

and 'Girls Reformatory.'" It is not suggested that any of the contributors was distinguished by his place in the literary world or by the quality of his style. (Cf. *Halsey* v. *New York Society*, 234, N. Y. 1.) In short, we have here before us accumulations of details of heinous wrongdoing which plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake. Whether the statute extends to accounts of criminal deeds not characterized by bloodshed or lust is a question that does not here arise. (See *United States* v. *Limehouse*, 285 U. S. 424; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *People* v. *Sanger*, 222 N. Y. 192.)

We pass now to the defendant's contention that the statute is unconstitutional because the criterion of criminal liability thereunder is "a personal taste standard, uncertain, indefinite and *ex post facto* in its practical operation." In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to whether a particular publication is indecent or obscene in that sense is a question of the times which must be determined as matter of fact, unless the appearances are thought to be necessarily harmless from the standpoint of public order or morality. (See *People* v. *Pesky*, 254 N. Y. 373; *People* v. *Wendling*, 258 N. Y. 451; *People* v. *Streep*, 264 N. Y. 666; *People* v. *Berg*, 269 N. Y. 514; *People* v. *Fellerman*, 269 N. Y. 629; *People* v. *Brewer*, 272 N. Y. 442; *Foy Productions Ltd.* v. *Graves*, 278 N. Y. 498; *People* v. *Osher*, 285 N. Y. 793.) Never has this perception been more forcefully expressed than in this sentence by Cardozo, J.: "Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate." (Paradoxes of Legal Science, 37.) The constitutional validity of that standard has long been established. (*United States* v. *Rosen*, 161 U. S. 29.) (See *United States* v. *Rebhuhn*, 109 F. 2d 512, 514; *Magon* v. *United States*, 248 F. 201, certiorari denied 249 U. S. 618.)

Under the statute, as the defendant sees it, "publication of any crime book or magazine would be hazardous." For reasons that have already been stated, we believe this assertion to be an exaggeration; but the point is of little account in any event, since "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." (*Nash* v. *United States*, 229 U. S. 373, 377.) A recent illustration comes readily to hand: An occupier of land who by his use of it does an unreasonable injury to his neighbor's property can be held to answer therefor, though he may have been guilty of no more than an error of judgment. (*Dixon* v. *New York Trap Rock Corp.*, 293 N. Y. 509.) So when reasonable men may fairly classify a publication as necessarily or naturally indecent or obscene, a mistaken view by the publisher as to its character or tendency is immaterial.

In anticipation perhaps of what we have already said, the defendant lastly argues for a fresh conception of freedom of the press under which the heretofore accepted requirements of decency would no longer be operative against obscene publications. We see no immediate necessity for announcing so radical a departure from the collective reasoning of our ancestors, a position whereof we think ourselves to be assured by the following words of the highest court in the land: "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise a constitutional problem. These include the lewd and obscene, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572. See the

cases there cited and 2 Cooley on Constitutional Limitations (8th ed.), 886, 1328.)

The judgment should be affirmed.

LEHMAN, *Ch. J.*, (dissenting):

I dissent on the ground that the statute, as construed by the court, is so vague and indefinite as to permit punishment of the fair use of freedom of speech. (*Stromberg* v. *California*, 283 U. S. 359.) Though statutes directed against "obscenity" and "indecency" are not too vague when limited by judicial definition, they may be too vague when not so limited. (See *McJunkins* v. *State*, 10 Ind. 140; *Jennings* v. *State*, 16 Ind. 335.) It is the function of the Legislature to define the kind of conduct which is harmful from the standpoint of public order or morality and should be prohibited. Then the question whether the conduct of a defendant falls within that definition may be one of fact. The morality of the community does not, however, become the standard of permissible conduct until the Legislature has embodied its conception of that morality in a regulatory statute.

Judgment should be reversed.

Lewis, Conway, Desmond, Thacher and Dye, JJ., concur with Loughran, J.; Lehman, Ch. J., dissents in opinion.

Judgment affirmed.